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Supreme Court, U. S.
FILED
JUN 20 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1507

In the Matter of
M. LEE MONROE, individually and
doing business as NORTH AREA
REFUSE COMPANY, a sole
proprietorship, Petitioner

vs.

JAMES E. CUSSEN, Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

An involuntary petition was filed April 12, 1968 and the bankrupt, petitioner herein, consented to adjudication on April 21, 1968. When the bankrupt did not appear at the first meeting of creditors on May 28, 1968, the Referee continued the meeting to

June 25, 1968, at the request of her counsel. At the continued hearing, counsel produced a letter to support his request for an extended continuance (R 16). Counsel then stated that he had no way of reaching the bankrupt by telephone (R 18); that she hadn't returned the schedules for filing (R 15); hadn't advised him of her address (R 9); and hadn't replied to his letters (R 15). He asked for and was granted permission to withdraw (R 15). The court continued the hearing to August 13, 1968. When the bankrupt telephoned counsel following the meeting of June 25, 1968, he told her that he had withdrawn as her counsel. On August 21, 1968, counsel wrote a letter to the bankrupt (Bankrupt's Exhibit 2) again requesting a medical certificate to show the

bankrupt's inability to appear and stated he would try to "re-open" the first meeting.

The Referee conducted a hearing to determine whether the bankrupt had waived her right to discharge on March 31, 1970 and on June 9, 1970 at which the bankrupt appeared. On June 19, 1970, the Referee made his order that the bankrupt had waived her right to a discharge (CT 11) and a petition for review was filed by the bankrupt on August 31, 1970 (CT 1). On December 20, 1970, Hon. Phillip C. Wilkins, United States District Judge heard oral argument on the petition for review. On January 28, 1971, an order was made denying the petition for review and affirming the Referee's order.

ARGUMENT

The dissenting opinion in the Court of Appeals and petitioner's argument to this court incorrectly assumes that no opportunity was afforded to petitioner to make a complaint to the District Judge about the alleged prejudgment of the Referee. The Referee's letter of July 10, 1968, was attached as an exhibit to the petition for review (Clerk's Transcript, CT 5). But the petition for review simply refers to such letter to show that "conjecture" on the part of the Referee was the sole basis for his finding that the bankrupt had left the State of California just before bankruptcy to avoid the actions of her creditors (CT 12).

The only provision in the Bankruptcy Act relative to disqualification

of a Referee that is applicable here is Section 22b by which the judge may, at any time, for the convenience of the parties or for cause, transfer a case from one Referee to another (Italics added). General Orders in Bankruptcy, Order No. 47 (Petition for writ of certiorari, Page 3), provides that the judge, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. Petitioner could have made an application to transfer the bankruptcy proceedings to another Referee for a hearing or she could have asked for an evidentiary hearing, de novo, before the District Judge if she believed that the Referee had prejudged the merits of the controversy.

The case, turning upon its own facts, was resolved before the Referee upon conflicting evidence and there are no important questions presented in the petition which would affect the rights of other litigatns.

In view of petitioner's failure to squarely raise the issue of the Referee's prejudgment of the case, or his bias or prejudice in the District Court, this court should not disturb the result reached in the lower courts

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

DATED: June 16, 1972.

LOREN S. DAHL
Member of the Bar of
the Supreme Court
THOMAS W. OLSON, JR.
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